No. 8178

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ARTHUR J. EIDE, by BERTHA K. EIDE, his Guardian ad litem,
Appellee.

Appeal from the District Court of the United States for the Northern District of California, Northern Division.

APPELLEE'S REPLY BRIEF

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MISCELLANEOUS

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THE FACTS.

This is a "fact" case arising out of a suit at law.

We cannot agree that the Government's "Statement of the Case" is entirely accurate as we will hereafter show by actual quotations from the record itself.

This is a suit on a policy of war risk insurance in the amount of Ten Thousand (10,000.00) Dollars, for which premiums were paid by the insured up to and

including midnight of July 1, 1919, a period of five months after his discharge from the army.

The jury, by their verdict, found as a fact that the insane plaintiff, Arthur J. Eide, has been totally and permanently disabled since January 29, 1919, by reason of mental diseases.

ASSIGNMENTS OF ERROR.

The Appellant relies upon two Assignments of Error as follows (R. 10):

> "And in connection with its petition for appeal therein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it and upon which it relies to reverse the judgment herein:
>
> I.
>
> The District Court erred in denying defendant's motion for a non-suit on the ground that no evidence had been brought forth to show the disability on the date alleged in the complaint.
>
> II.
>
> The District Court erred in denying defendant's motion for a directed verdict on the ground that the evidence was insufficient to sustain the allegation of the complaint to the effect that the plaintiff became totally and permanently disabled prior to the date of lapse of his insurance policy."

PERTINENT STATUTES AND REGULATIONS INVOLVED.

Pertinent statutes and regulations bearing on the particular point involved in this appeal are as follows:

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> "That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protections for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon payment of the premiums as hereinafter provided."

This section was restated in substance in subsequent amendments (Sec. 300 World War Veterans Act, 1924; U. S. C., Title 38, Sec. 511).

In Treasury Decision 20, Bureau of War Risk Insurance, dated March 9, 1918, "permanent and total disability" was defined as follows:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> "Total disability shall be deemed to be permanent whenever it is founded upon conditions

> which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *"

In addition Section 19 of the World War Veterans Act as amended (38 U. S. Code, 445), provides that in the event of disagreement between the insured veteran and the government suit may be brought in the district court etc.

Rule X-(1) of the U. S. Circuit Court of Appeals for the Fifth Circuit reads as follows:

> "No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions; provided: The entire charge may be included in the bill of exceptions by order of the trial judge whenever deemed necessary for a better understanding of the errors assigned."

Rule XI of the U. S. Circuit Court of Appeals for the Fifth Circuit reads as follows:

> "XI.—Assignment of Errors
>
> "The plaintiff in error or appellant shall file with the clerk of the Court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be

allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the Court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the Court and errors not assigned according to this rule will be disregarded, *but the Court, at its option, may notice a plain error not assigned.*" (Italics ours.)

Rule 11 of the U. S. Circuit Court of Appeals for the Ninth Circuit reads as follows:

"Rule 11—Assignment of Errors

"The appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No appeal shall be allowed until such assignment of erors shall have been filed. Citation shall issue immediately upon the allowance of the appeal. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given

or in instructions refused. Such assignment of erors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, *but the court, at its option, may notice a plain error not assigned.*" (Italics ours.)

QUESTIONS PRESENTED.

(With Citations).

1. SHOULD THIS COURT REVERSE THE JURY'S VERDICT FINDING THAT THE INSANE APPELLEE HAS BEEN PERMANENTLY AND TOTALLY DISABLED SINCE JANUARY 29, 1919, ON ACCOUNT OF MENTAL DISEASES?

Parsons v. Bedford, 3 Peters 433, 7 L. Ed. 732;
Corsicana National Bank v. Johnson, 251 U. S. 68, 40 S. Ct. Rep. 82, 64 L. Ed. 141;
Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721;
Lumbra v. United States, 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 492;
La Marche v. United States, 28 Fed.(2d) 828;
United States v. Barker, 36 Fed.(2d) 556;
Hayden v. United States, 41 Fed.(2d) 614;
Mulivrana v. United States, 41 Fed.(2d) 734;
United States v. Burke, 43 Fed.(2d) 653;
United States v. Meserve, 44 Fed.(2d) 549;
United States v. Rasar, 45 Fed.(2d) 545;
United States v. Rice, 47 Fed.(2d) 749;

United States v. Stamey, 48 Fed.(2d) 150;
Louie Poy Hok v. Nagle, 48 Fed.(2d) 753;
United States v. Lawson, 50 Fed.(2d) 646;
Sorvik v. United States, 52 Fed.(2d) 406;
United States v. Lesher, 59 Fed.(2d) 53;
United States v. Dudley, 64 Fed.(2d) 743;
United States v. Francis, 64 Fed.(2d) 865;
United States v. Burleyson, 64 Fed.(2d) 868;
United States v. Todd, 70 Fed.(2d) 540;
United States v. Suomy, 70 Fed.(2d) 542;
United States v. Kane, 70 Fed.(2d) 396;
Vance v. United States, 43 Fed.(2d) 975 (C. C. A. 7);
Malavski v. United States, 43 Fed.(2d) 974 (C. C. A. 7);
Ford v. United States, 44 Fed.(2d) 754 (C. C. A. 1);
United States v. Phillips, 44 Fed.(2d) 689 (C. C. A. 8);
Barksdale v. United States, 46 Fed.(2d) 762 (C. C. A. 10);
United States v. Godfrey, 47 Fed.(2d) 126 (C. C. A. 1);
Carter v. United States, 49 Fed.(2d) 221 (C. C. A. 4);
Kelley v. United States, 49 Fed.(2d) 897 (C. C. A. 1);
United States v. Tyrakowski, 40 Fed.(2d) 766 (C. C. A. 7);
United States v. Storey, 60 Fed.(2d) 484 (C. C. A. 10);
United States v. Albano, 63 Fed.(9th) 677 (C. C. A. 9);

United States v. Sorrow, 67 Fed.(2d) 372 (C. C. A. 5);
United States v. Adams, 70 Fed.(2d) 486 (C. C. A. 10);
United States v. Anderson, 70 Fed.(2d) 537;
United States v. Flippence, 72 Fed.(2d) 611 (C. C. A. 10);
United States v. Brown, 72 Fed.(2d) 608 (C. C. A. 10);
United States v. Higbee, 72 Fed.(2d) 773;
United States v. Harless, 76 Fed.(2d) 317 (C. C. A. 4);
Gray v. United States, 76 Fed.(2d) 233 (C. C. A. 8);
Vietti v. Hines, 48 Cal. App. 266, 192 Pac. 80.

2. ALTHOUGH NOT OBJECTED TO IN THE TRIAL COURT NOR EVEN SPECIFIED IN ITS ASSIGNMENTS OF ERROR, AND NOW SET FORTH FOR THE FIRST TIME IN ITS BRIEF ON THIS APPEAL, THE APPELLANT NOW SEEKS TO RAISE THE QUESTION OF WHETHER REVERSIBLE ERROR WAS COMMITTED IN THE INTRODUCTION OF MEDICAL OPINION TESTIMONY ON THE QUESTION OF WHETHER THE APPELLEE WAS TOTALLY AND PERMANENTLY DISABLED. SHOULD THIS COURT DISTURB THE JURY'S VERDICT FOR THIS REASON?

United States v. Atkinson, 296 U. S. .....; 56 S. Ct. 391, 80 L. Ed. .....;
Rules X-(1) and XI C. C. A. Fifth Circuit (From Montgomery's Manual of Federal Jurisdiction and Procedure, 3d Ed.);
Rule 11 C. C. A. Ninth Circuit.

Argument

I.

THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT OF THE JURY.

THE RULE.

Regarding jury trial, almost one hundred years ago Justice Storey of the United States Supreme Court, in *Parsons v. Bedford,* 3 Peters 433, 7 L. Ed. 732, said:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated in and secured in every state constitution in the Union * * *. One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people."

The rule regarding the quantum of evidence necessary to sustain a verdict has been very aptly stated by the late Judge Sawtelle, in our opinion one of the ablest judges ever to have sat on the Circuit Court of Appeals for the Ninth Circuit. In *United States v. Burke,* 40 Fed.(2d) 653 at page 656, Judge Sawtelle said:

"Courts often experience great difficulty in determining whether a given case should be left to the decision of the jury or whether a verdict should be directed by the court. Fortunately however, the rule in this circuit has been definitely settled and almost universally observed. Judge Gilbert, for many years and until recently, the distinguished senior judge of this court, whose gift for expression was unsurpassed has stated the rule as follows:

> " 'Under the settled doctrine as applied by all the federal appellate courts, when the refusal to direct a verdict is brought under review on writ of error, the question thus presented is whether or not there was any evidence to sustain the verdict, and whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.'

"And on a motion for a directed verdict the court may not weight the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence. Travelers' Ins. Co. v. Randolph, 78 F. 754, 24 C. C. A. 305; Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, 74 F. 463, 20 C. C. A. 596; Rochford v. Pennsylvania Co., 174 Fed. 81, 98 C. C. A. 105; United States Fidelity & Guaranty Co. v. Blum, 270 Fed. 946; Smith Booth-Usher Co. v. Detroit Copper Mining Co., 220 Fed. 600, 136 C. C. A. 58. In the case last cited this court said:

> " 'The right to a jury trial is guaranteed by the Constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto. United States Fidelity & Guaranty Co. v. Blake (C. C. A.) 285 Fed. 449, 452.'
>
> "Again, 'Such an instruction would be proper only where, admitting the truth of the evidence for the plaintiff below, as a matter of law, said plaintiff could not have a verdict.' Marathon Lumber Co. v. Dennis, 296 Fed. 471."

And in *United States v. Dudley,* 64 Fed.(2d) 743, this Court said:

> "The question before us is whether or not this evidence is so substantial as to justify submission of the case to the jury. We do not weigh the evidence; what our verdict would have been as jurymen is immaterial."

And again this Court in *United States v. Lesher,* 59 Fed.(2d) 53, said:

> "Under the seventh amendment to the Constitution, a jury trial is guaranteed in a civil action; and that it is error to direct a verdict for defendant if there is any substantial evidence is stare decisis."

And again, in *Sorvik v. United States,* 52 Fed.(2d) 406, this Court per Sawtelle, C. J., said:

> "The test to be applied in such a case, of course, is not whether the evidence brings conviction in the mind of the trial judge; it is 'whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party'. United States Fidelity & Guaranty Co. v. Blake (C. C. A. 9), 285 Fed. 449, 452, and cases there cited; United States v. Burke, 50 Fed.(2d) 653, decided by this court June 1, 1931 and cases there cited. And in measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff, we must bear in mind the remedial purposes of the World War Veterans' Act (38 U. S. C. A. 421 et seq.) which the courts have repeatedly held should be liberally construed in favor of the veterans. United States v. Eliasson C. C. A. 9), 20 Fed.(2d) 821, 824; U. S. v. Sligh (C. C. A. 9) 735, 736, certiorari denied, 280 U. S. 559, 50 S. Ct. 18, 74 L. Ed. 614; U. S. v. Phillips (C. C. A. 8), 44 Fed.(2d) 689, 692; Glazow v. U. S. (C. C. A. 2), 50 Fed.(2d) 178."

See also the following decisions of this Court:

United States v. Barker, 36 Fed.(2d) 556;
United States v. Meserve, 44 Fed.(2d) 549;
United States v. Rice, 47 Fed.(2d) 749;
United States v. Stamey, 48 Fed.(2d) 150;
United States v. Lawson, 50 Fed.(2d) 646;
Corrigan v. United States, 82 Fed.(2d) 106;

Hayden v. United States, 41 Fed.(2d) 614 (C. C. A. 9);

Mulivrana v. United States, 41 Fed.(2d) 734 (C. C. A. 9);

United States v. Rasar, 45 Fed.(2d) 545 (C. C. A. 9).

See also:

Corsicana National Bank v. Johnson, 251 U. S. 68, 40 S. Ct. Rep. 82, 64 L. Ed. 141;

Vance v. United States, 43 Fed.(2d) 975 (C. C. A. 7);

Malavski v. United States, 43 Fed.(2d) 974 (C. C. A. 7);

United States v. Godfrey, 47 Fed.(2d) 126 (C. C. A. 1);

Ford v. United States, 44 Fed.(2d) 754 (C. C. A. 1);

Carter v. United States, 49 Fed.(2d) 221 (C. C. A. 4);

Kelley v. United States, 49 Fed.(2d) 897 (C. C. A. 1);

United States v. Tyrakowski, 50 Fed.(2d) 766 (C. C. A. 7);

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721.

Bearing in mind the rule, we now turn to an examination of the record to see if there is any substantial evidence upon which the verdict can be sustained under this rule.

THE EVIDENCE.

APPELLEE EIDE'S CONDITION BEFORE HE WENT TO WAR.

Arthur J. Eide, the plaintiff, who is now an insane patient at the California State Hospital at Stockton, is described by the witness Joseph F. Henretti (R. 14) as follows:

> "We worked together for about four years. Before the war in the years Arthur and I was working for Davis together he was always very studious and energetic in his work there and put in a lot of time and was very ambitious. He did insurance work, underwriting. He was very neat, always neat in his appearance. I worked in the same department with him. He got along very good with his work."

And again the witness William Romaine, the office manager of the insurance brokerage firm where Mr. Eide was employed before the war, and who himself had been with that company for over forty years, testified concerning Mr. Eide (R. 17):

> "He came to work for us in November, 1912, and he left on December 12, 1917, to go to war. Between 1912 and 1917 I saw Mr. Eide every working day practically all the time he was there. I had charge of the whole office. I knew him very well, came in contact with him, keeping records of attendance and absence, and earnings and so forth. During this period I think he had a very happy appearance, was a very efficient clerk, did his work well, and to all appearances was a perfectly normal individual. He was continuously employed from 1912 to 1917."

Mrs. Bertha K. Eide, the appellee's mother and guardian, testified concerning the appearance of her son prior to the war (R. 27) as follows:

> "He was living with me at the time he went to war at No. 1700 McAllister Street, San Francisco, and was working at that time at Davis', the broker's office. He had been working there for four or five years. Before he went away he appeared to be a jolly boy, good natured, seemed he always took everything so good natured, was always jolly and took me out. He appeared very neat. He always had his clothes in good order and his shoes, and was very particular about his presence."

Mrs. Lucia Martin, who worked with Mr. Eide before the war for Davis & Son (R. 34) testified as follows:

> "I first met Arthur J. Eide at J. B. F. Davis & Son in 1914. I knew him very well. I worked very close to Mr. Eide. He helped me with my work and I went out to dinner with him on numerous occasions and the theatre on numerous occasions and out dancing. He was at all times a very cheerful person. He was more than the average in his neatness, immaculate in his appearance, and I could depend on him at all times to help me with my work. He was in the Fire Department and I was in the Fire Department. I would say that he was an intimate friend. Mr. Eide worked steadily, that is, every day there was work to be done."

It is therefore plain from the evidence, that Mr. Eide was a perfectly normal person prior to his entry into the World War.

We next come to the question of what happened to him while he was in the service.

WHAT HAPPENED TO EIDE IN THE SERVICE.

Frank A. Barrett, a fellow sergeant in the Army with Eide, testified by deposition (R. 22-23) as follows:

> "While I was acquainted with Mr. Eide he got sick with the influenza during the epdemic. As near as I can recollect it was in September or October of 1918. At that time we were stationed at Florence Field, Fort Omaha. We were quartered in tents which were heated by the usual Sibley stoves and the weather was chilly fall weather. Mr. Eide was removed from our company and sent to the hospital. I should say he was away about one month. Mr. Eide and I have slept in the same tent together for several months prior to his sickness and we worked together all of the time. Before he became sick his health was A number one and after he returned he was in bad health and did not have the pep that he had prior to his sickness and he seemed worried and sickly. After he returned he complained continually of severe headaches and pain in the back of his head. It was difficult to get him out of bed as he would rather stay in the barracks and rest and sleep and complain of headaches; acted rather sluggish and drowsy. I noticed that he would lay in bed at every opportunity, whereas before he was always on the go; rather extremely lively sort of fellow. Also he did not perform his work as he had before and it was necessary to perform some of his duties for him. After Mr. Eide returned

from the hospital, the Company was sent to establish a camp of its own about twenty miles north of Florence Field. The weather there was extremely cold and it rained practically all of the time we were there, and this condition of the weather was much harder on Sergeant Eide than on the rest of us, because of his sickness. Eide was able to 'get by' because the rest of us fellows handled the heavy work. At the time I was discharged I noticed that his health had not improved. He was still rather dull and sickly at that time. He still remained in bed as much as possible and complained of headaches and pain in the back of his head."

And on cross-examination Sergeant Barrett (R. 25) testified:

"I was not present when Sergeant Eide was taken sick, nor do I know what symptoms he had. About all I know is that he was taken to the hospital. Afterwards I perceived that he had slowed up considerably since his sickness and that he was lifeless and did not have the 'pep' and spirit that he had prior to his sickness. He refused to go out to entertainments and parties as he had theretofore and gave as his reason the headache complaint. He would go out occasionally, but not nearly as much as before, but he complained continuously of the headaches until my discharge."

EIDE'S CONDITION IMMEDIATELY UPON DISCHARGE AND AFTER.

William Romaine, the office manager for Davis & Son, testified (R. 17-18 concerning Eide's appearance immediately after his discharge from the army, and before his policy lapsed, as follows:

> "As to my recollection, Mr. Eide came back to the office immediately after the war. I think it was 1919 but I couldn't give you the month or date. He appeared changed at that time. He simply came into the office and talked to the different boys and he was very friendly with different ones, most of the firm and myself around the office, and he was offered his old position if he wished to accept it. I offered that to him personally. His reaction was that he was indifferent and a different man entirely. He didn't seem the same happy sort of an individual and he was indifferent about accepting reemployment. In fact he was changed so much that I asked Mr. Henretti who was one of Mr. Eide's associates if he knew what was the matter. I saw him one time after that when he was in the garage business and he was just about the same."

Arthur J. Hammer, now a restaurant proprietor in San Francisco, and who has known Mr. Eide for more than twenty-five years, and who used to play ball with him before he went into the army described his appearance (R. 18) before the war as "physically fine". This witness went into partnership in the garage business with Mr. Eide after the war, and in describing Eide's appearance after the war between

1919 and 1923, particularly in 1923, when he and Mr. Hammer had the garage together (R. 18, 19, 20, 21), testified:

> "We were in partnership I would say about six months. I came to the conclusion Mr. Eide must be crazy, at the time I had the garage. After I found we were losing business and there must be something wrong so I had to get out of the business and go back to the restaurant business. When I had the garage in 1923 I had several occasions to watch him while he was waiting on customers and I noticed unusual things about his conduct. At times he would be standing at the gasoline pump staring into space for maybe half an hour at a time. I would be working on cars at the back of the garage and I would come up and ask him what was the trouble. He would be just looking into space and wouldn't listen to what I said. It seemed to me as though he wouldn't listen to anything. He would complain about his head aching him. I don't know how much money Mr. Eide drew out of the business and I don't know whether he was subsequently employed. After the garage venture I also saw him in 1919. He came in to eat in the place of business and I would just talk casually to him. I noticed he wasn't exactly the same man he was before the war. I think it was in 1919 that I saw him. I saw him frequently after we dissolved the partnership in the garage. He would come into my restaurant at Sixth and Mission Streets, San Francisco. I know one time he came down there with a Morris Contract to have me sign. He wanted to borrow money to build an invention that he had in view

and I passed it off. About every half hour he would come in with that same contract and want me to sign it. He came in about five or six times. Of course I didn't sign it. He wouldn't look you in the face. He would look down and sort of hold the contract in front of me and seem to be in a hurry to go places. I also noticed that he always seemed to think people were talking against him. He always thought there was somebody was not pulling for him. I noticed this attitude a little before I went into the garage business but didn't pay much attention to it. It was after I went in the business with him that time that I found it. When I first saw him in September of 1919 he seemed kind of distant, didn't seem to have the same manner about him. He seemed to have a far away look, seemed to be looking into blank space. This was different from the way he appeared before the war. After the garage business he would come into the restaurant to eat. He would sit up at the counter to have meals and when the girl put it down in front of him he would stand there and look at it, look into space. I would have to go up and ask him what was the matter. He wouldn't evidently hear me. I would have to shake him and then he would kind of wake up and start to eat. His meal would be sitting in front of him sometimes maybe five, ten or fifteen minutes before he would start it after I had gone up and talked to him. Then he would kind of watch. He would eat and then lay down his knife and fork and kind of look into space some more, maybe sometimes three-quarters of an hour, before he would go out and sometimes he would get up and walk

out and come back in again. Before I was in the garage business he used to come in the restaurant and he would seem kind of strange but I didn't pay any attention to it. Before the war he was always pleasant, always jolly, laughing, able to carry on a conversation. After he wasn't very cordial, seemed to be distant."

Mrs. Bertha K. Eide, plaintiff's mother, testified concerning his condition immediately after he came back from the war and even prior to his discharge as follows (R. 27, 28 and 29):

"* * * I saw Arthur when he returned from the war in January 1919. This was in the first part of January and four or five weeks before he was actually discharged. He had to stay in the Presidio on account of flu. The first time that I saw him he had no expression at all. He looked so different and I says: 'Arthur, what's the matter with you?' 'Oh' he says, 'I left some men down on Market Street', he says, 'I have to hurry.' *He stayed home that time about five or ten minutes.* When he came home again he seemed so quiet and said he had headaches. He didn't tell me that the back of his head hurt but he had to go to bed a couple of days at a time and I put water on his head. This was right after he was discharged. Then they got worse all the time and I tried to doctor him up. I thought it was just ordinary headaches, you know, and I put wet towels on his head and tried to do the best I could for him. He had these headaches when he first came back and he had them for three or four years, maybe more than that, really hard

headaches. He lived with me when he was discharged until I put him into Palo Alto in 1927. I noticed a fixed stare on his face when he first came home he wasn't the same and he wanted to be by himself. He didn't want to go to see any friends and he was altogether different. *He appears to me now to be just the same.* I do not think he is crazy, I think he is nervous. I never thought he was crazy and I do not think so now.

Q. You remember when he tried to work for the Southern Pacific up in Dunsmuir?

A. He worked off and on and he came home between times, odd jobs.

Q. How did he appear when you saw him when he came home?

A. Oh, he was nervous just the same, just about the same all the time.

I remember when he had the garage. When he went away to war he was jolly and had a good hope for the future and when he came back he didn't think anything about the future, didn't have any expression on his face. He was nervous. If I said anything to him why he—the tears would come in his eyes. He was depressed. I don't know how many jobs he had from the time he came back from the service until he entered the hospital in 1927. In 1919 he went one week at the garage and he was fired out of that and the next thing he was at another garage for about three months. He was night watchman at the garage. He quit because he had severe headaches during all of the time. He had headaches all the time when he was at *Dunsmuir* but he was a boy

who never complained very much, but he just went to bed and just stayed there like a dead person. When I first took him to Palo Alto he was so nervous he couldn't hold a book in his hand, you know, it just dropped out of his hand while he was reading. When Arthur worked in the garage he appeared just about the same, he was very nervous, headaches, and night sweats.

Q. Did you ever try to treat him for any of these things?

A. Well, I treat him like I did, you know, like we used to home made treatment. He was just the same all the time." (Italics ours.)

And on cross examination this witness testified in part as follows (R. 29, 30):

"I don't see any difference in Arthur's condition now than it was when he got out of the service. He was very nervous. He couldn't work anywhere and I know it because he tried it after I—Oh I don't know what year it was that he was a night watchman in a place on Market Street and after that he got sick in bed for a long time. When he came out of the Army he went to work at Sansome Street, I think it was, in a garage, 55 Sansome Street. The Merchants' Garage. He worked there one week and was fired. Then he didn't do any work for oh, for a whole year, and the next year he got work at Terminal Garage and he was there about three months. That was in 1920. He didn't do anything else in the meantime beside work at the Merchants' Garage and the Terminal Garage."

And again on Cross Examination (R. 33) Mrs. Eide testified as follows:

> "Q. That was in 1923?
>
> A. Yes, 1922 and 1923 I don't know which.
>
> Q. Do you think at that time he was in the same condition that he is in now?
>
> A. Yes, I think he is just the same as when he came out of the Army. I can't believe anything else. He is very nervous and has been since he came out."

In this connection it must be borne in mind that the government's own doctors testified that the man was incompetent and permanently and totally disabled from 1922 or 1923. Dr. Richard T. O'Neil, the government doctor at the Palo Alto Veterans Hospital (R. 131) testified:

> "* * * He was a potential praecox all his life and probably went through his early life and in the army, but I find from his history and the testimony I have heard in the court that his psychosis busted through and became pronounced around in 1922 or 1923.
>
> The Court: When you say it broke through at that time, it became pronounced, you mean at the time it had reached a degree which made him totally and permanently disabled as it is defined in that definition?
>
> A. Yes."

Indeed it is not questioned by the government but is impliedly admitted that Eide from and after 1922 or 1923 was unquestionably incompetent and insane.

Mrs. Lucia Martin who worked with Eide before the war and was intimately acquainted with him through their work in the Davis Company before the war, testified concerning his appearance immediately after he came back from the war and before his insurance lapsed, as follows (R. 34, 35 and 36):

> "I first saw him after the war in the early spring of 1919. I would say in February or March. I spoke to him at that time about fifteen or twenty minutes. *He appeared irrational to me.* I asked him if his position had been offered to him. He said it had. I said: 'Are you going to take it?' He said 'No', he wasn't interested in it, it gave him terrible headaches to work and didn't pay to work for other people anyway, you never got anywhere. When I saw him he was rather unkempt in his appearance. He didn't seem to be interested in my conversation. He just stood there and had a fixed stare on his face. He just stared straight ahead of him. There wasn't any expression on his face no matter what I said. He wouldn't smile or laugh. I tried to bring up things we used to talk about and used to be interested in. He just didn't acknowledge them at all, apparently almost to the point of rudeness. *He appeared to me to be irrational. So much so that I was really shocked and mentioned it to several of the boys in the office afterward.* The next time I saw him was in the garage on Divisadero Street. While he was at Davis' we had often laughed about the time when I would buy a car. He said he would take care of it. I learned through one of the boys in the office he was in this garage on Divisadero Street. I thought if I took it to a person who knew me

they would service it correctly. I was in there in the morning on my way to work with the car. He acted as though he had never seen me before. He just stood there and stared off into the corner, never answered me, never spoke to me. Finally I left and I worried very much all day about that car, it was a new car and my first car. So when I left the office at five o'clock I thought I would go out and pick up my car. When I got to the corner of Sansome and Pine there was a car standing out almost toward the middle of the street looking very much like my car. I went up and saw it was my license number, my car, with the keys in it, and the engine running. It hadn't been cleaned or washed or hadn't been greased, nothing done to it and there wasn't anyone around. Mr. Eide never made any explanation for this." (Italics ours.)

And on cross examination Mrs. Martin (R. 36, 37, 38 and 39) testified:

"I saw Mr. Eide in 1919 and I would say that he was irrational.

Q. What do you mean by irrational?

A. Well, a person you would know very well, were friendly with, who had always been so courteous to you should suddenly come in and try not to speak to you, just stand there and stare into space no matter how hard you tried to get his attention in conversation, refuse to talk to you. He was almost rude in his inattention and indifference. That I called irrational. I did not attribute his conduct to the fact that he wasn't interested in me any more because I was not engaged to him at any time. I didn't go with him to the exclusion of other young men, or he didn't go with me. It

was just a friendship. On the day that I saw him I was in his company for fifteen or twenty minutes. At that time he was offered his old position, they offered the boys who came back from the war their positions back in our office and he was offered his back. I wouldn't have offered him a position. *I formed the opinion then that he was insane.* I took my car to him later as I heard he was in the garage business. I felt sorry for him. I thought if he had pulled himself together, now that he could get in this garage I would help him out. He wasn't friendly there. He wasn't pleasant or courteous. He stood there and stared, a fixed stare on his face. This alone didn't cause me to think he was insane.

Q. The fact he was rude didn't cause you to think he was insane, did it?

A. No.

Q. But he stared.

A. Yes.

Q. What else did he do beside staring?

A. He kept staring first one way and then another way as though someone were after him and he wanted to bolt out of the place.

Q. What else?

A. Well, the manner of answering me, his answers.

Q. Give me the questions and the answers.

A. Well, I said: 'Arthur, are you going to take your position back? No. Why not? Gives me headaches to work. There is no use in working for people anyway, you never get anywhere anyway.'

Q. Now let's take that then. You asked him 'Are you going to go to work? No. What is the

use of working, don't get you anywhere anyway.' That didn't cause you to think he was insane?

A. Yes, it did, and having known him before.

Q. That is what caused you to think he was irrational together with staring?

A. Yes. My definition of irrational is a person who doesn't act in a sane, sensible, rational manner. I said that Mr. Eide was not sane because I have never had anybody come and stand and stare and act as though they wanted to bolt away when I am trying to talk to them, act as though somebody were after them. He acted offish toward me and there was a marked difference in his personal attitude. I also noted that he kind of stared and looked around and so forth. He could not carry on a conversation with me. I tried my level best. He answered me abruptly. He seemed to have lost interest in me and in the work and in everything.

Q. Now, if you would make the acquaintance of a gentleman and you would be friendly and after a matter of two years would go by and you would meet him and he would be abrupt, indifferent, cold, rude, improvident, instead of looking at you and being interested in your talk, would be looking at someone else, would you under those circumstances come to the conclusion that such person would be insane?

A. Well, there are different ways——

Q. Answer yes or no.

A. The way you have described it I would say no.

Q. You would say no.

A. Yes.

Q. You could not come to the conclusion he was insane?

A. No.

Q. Have I described all the things you observed that day?

A. No.

Q. What else was there?

A. It wasn't just a coldness or rudeness or indifference, it was an expressionless stare, a mask-like face, a face without any expression like an insane person.

Q. Let's include that information as we refer to this imaginary man, say he would have a blank appearance on his face, a harried expression and a blank stare, would you then say such person or man is insane?

A. Yes, I would. I would describe Mr. Eide's look as vacant and shifty. I have not seen him during the last three years. The last time I saw him was when he was in that garage on Divisadero Street. That morning when I took my car there I tried very hard to talk to him. His appearance was just the same. He was just as hazy one time as he was at the other time. I certainly would not have employed him in my service in the Fire Insurance."

THE APPELLANT'S CONTENTION.

The appellant claims that notwithstanding the foregoing testimony, which of course under recognized rules must be given full faith and credit as well as all reasonable inferences and deductions to be drawn therefrom, such evidence in connection with the medical evidence as shown by the record is not sufficient evidence of total permanent disability prior to the lapsation of the policy on July 1, 1919. Counsel for

appellant seek to rest their whole defense on plaintiff's work record while he worked for the Southern Pacific Company part of the time at Dunsmuir and part of the time at the Bay Shore Shops in Visitacion Valley in San Francisco. They set forth Eide's work record on pages 11, 12 and 13 of their brief and pages 93 and 94 of the Record.

In our opening statement of this brief we stated that we could not agree that the government's statement of the case was entirely accurate as we would hereinafter show by actual quotations from the record itself. In making this statement we referred to the statement at the top of page 13 of appellant's brief where they quote from the testimony of the timekeeper for the Southern Pacific Company as follows:

> "If he had been dropped from the rolls because of illness it would have been shown." (R. 94.)

An examination of the Record, page 94, does not bear this out. The Record shows on the other hand that the very opposite was true, and shows that counsel has misquoted the Record and that the Record itself reads (R. bottom of page 94):

> "If he were laid off because of illness it would *not show on the record.*" (Italics ours.)

We do not claim that counsel for the appellant in writing their brief intentionally meant to mislead the Court by misquoting the evidence but we do claim the mistake occurred in a matter of extreme importance in connection with one of the high points

in this case and although it was probably an oversight on counsel's part we do feel that the same should be called to the Court's attention.

This work record with the Southern Pacific Company, which is the only work record of any consequence which Eide followed after the war, shows that for the last six and a half months of 1920 he earned $1,262.70 or an average of $194.26 per month for the six and a half months. That in 1921 he earned $776.86 or an average of $64.78 per month, not working during any part of February, March, April, November or December of that year, and that during the first four months of 1922 he earned $355.62 or an average of $88.90 per month. In this respect we believe it is a matter of such wide common knowledge that the Court could almost take judicial knowledge of the fact that employment was plentiful and men were hard to get for the years from 1920 to 1923.

Concerning plaintiff's condition while working for the Southern Pacific Company, plaintiff's mother, Bertha K. Eide (R. 134) testified:

> "When Arthur was working for the Southern Pacific Company at Dunsmuir, he would come home and I would see him. He was very nervous and he had headaches just the same."

That a work record is not necessarily conclusive or determinative against a claim of permanent total disability has of course been held repeatedly by this and other courts, including the United States Supreme Court, and if the insured worked to the detriment of his health and work aggravated his con-

dition he could still be totally and permanently disabled notwithstanding that he did work for a time. This we will hereinafter show under an appropriate heading.

WHAT WORK EIDE ATTEMPTED TO DO AGGRAVATED HIS CONDITION AND MADE HIM WORSE.

Dr. R. L. Richards, a witness called on behalf of the plaintiff, testified (R. 41):

> "I examined Arthur J. Eide professionally on May 16, 1929, when his mother brought him to me and I examined him and gave advice as to treatment. From the nervous and mental troubles, his family history, his personal history, present condition, examination, diagnosis and treatment, I found that Eide was definitely mentally sick; by that I mean that he was suffering from neuropsychiatric disease. He was a case of dementia-praecox and treatment was followed up at the hospital."

And again Dr. Richards testified (R. 42):

> "* * * My impression was that the man had had an acute infectious attack in 1918, that it might have been and probably was encephalitis lethargica. It would not preclude the dementia-praecox-like symptoms which he had at the time that I saw him."

And again Dr. Richards testified (R. 46):

> "Q. Now, you would not be able to say, Doctor, whether this condition was brought about by influenza or not, would you?

A. I could only say that it would be brought about by that. I realize that I have not all the information, if that is what you mean.

Q. That condition that you found this patient in isn't a frequent result of influenza at all, is it?

A. It isn't an infrequent result and it is a well known fact that you do have that sort of a condition following the influenza."

Dr. Fred J. Conzelmann, employed by the California State Hospital at Stockton, who served as a Lieutenant in the regular Army Medical Corps for five years following his graduation from Ann Arbor Medical School in 1905, and who has been employed by the Stockton State Hospital since 1916 with the exception of eight months which he spent in the Medical Corps of the Army at Camp Kearny during the World War and who since June 4, 1932, has been and still is the ward surgeon on Mr. Eide's ward at the State Hospital, testified as follows (R. 48):

"I am the ward surgeon of Mr. Eide. He was admitted June 4, 1932, and he has always been on my ward and he was out from September 29, 1932, to January 9, 1933, and since then he has been back for over a year, always on my ward. I see him nearly every day. His present diagnosis is dementia praecox, paranoid type. This is a disease of the adult. Science has not discovered the cause of the disease. Its usual course is very gradual, extending over months or years before it fully develops and there is usually an oddity of conduct, rudeness and explosive episodes, feeling that he is discriminated against or people are

against him, and then they develop ideas that people are actually persecuting them or getting them out of jobs, very likely to change jobs suddenly without any particular cause. We find it has just been their own idea that somebody is having it in for them, and then as they go on and develop various ideas. Very often they have grand ideas that they have great wealth or they can have an invention and they can communicate through the air with chemical substances, don't need a radio or telephone to talk distance and some have ideas they are God or Christ or John the Baptist or Mary, the Virgin Mary. Some of their inventions, usually something impossible about it, and then they have often mind influences and thought feeling or thought reading and the like. Mr. Eide tells us that he hears voices out of the air, they call him very bad names, so bad sometimes he doesn't want to repeat them, and frequently states he can communicate with the Government just by shouting out loudly and he has these explosive episodes and he sometimes suddenly gets up from the chair, runs up to the wall and kicks it and then runs away from the wall and always asks about when he is to be let out, he is not insane, that people are jealous of his inventions.

Q. Doctor, have you seen Plaintiff's Exhibits 2 and 3 here?

A. Yes.

Q. Have you also seen Mr. Eide drawing like that?

A. Yes, he has at various times. He has made certain drawings at the hospital that he says is

an invention. He has not invented anything that we have ever found out."

There was read into evidence from the Government files a record of plaintiff's examination, being Plaintiff's Exhibit No. 5-A (R. 54). In explaining part of this report Dr. Conselmann testified in part as follows (R. 54):

"Q. (reading) 'Impairment of judgment and lack of insight suggest the diagnosis of dementia praecox, catatonic type, however, residuals of enecephalitis must be excluded.' What is encephalitis, Doctor?

A. (explaining) Encephalitis is—Encephalitis means the brain, Latin word or medical word, and means an inflammation of the brain, and in 1918 we had great epidemics of flu and at the same time we also had epidemic of encephalitis where the individual would pass into a stupor and sleep for a long time and we call that encephalitis or sleeping sickness."

There was next read into evidence as part of Plaintiff's Exhibit 5 a report of a Government examination of the plaintiff at the Government's Veterans Hospital at Palo Alto, dated June 11, 1930, which read as follows (R. 56 and 57):

"Q. (reading) The next examination is dated June 11, 1930. 'Diagnosis: Dementia praecox, catatonic type. Treatment recommend: Continued hospitalization. *Is he competent? No. If not approximate date of beginning of incompetence? 1919?' with a question mark after it.* 'Remarks

and recommendations: Patient was presented to staff on June 9, 1930, the diagnosis above mentioned agreed to by all members. It is the opinion of the staff that patient is psychotic and incompetent, permanently and totally disabled.' what does psychotic mean?

A. That refers to a mental disability. Insanity is the legal word and psychosis is the medical term." (Italics ours.)

Concerning the notation in the Government medical report of June 11, 1930 wherein the phrase is used "Is he competent? No. If not, approximate date of beginning of incompetence? 1919?" Dr. Richard T. O'Neil, a Government doctor, and the doctor who examined Eide at that time and made the report, testified on cross examination as follows (R. 133):

"Q. When do you think his incompetency began?

A. Well, I can't put a specific date except I would say from what I heard in the courtroom the last two days what you say in testimony, I would say around 1922 or 1923.

Q. That is your signature, isn't it, Doctor? (Exhibiting document to witness.)

A. Yes.

Q. I will ask you if you didn't—did you type this report up, was it made under your supervision?

A. Under my direction, yes.

Q. This states: 'Is he competent? A. No. If not approximate date of beginning of incompetency? 1919?', with a question mark.

A. Yes.

Q. Now, what do you say?

A. Well, I say that 1919 if we didn't feel that he was incompetent in 1919 we put the question mark there. We were undetermined. It was questionable if the man was competent or incompetent in 1919 on the information we then had at our hands.

Q. In other words you thought he was incompetent in 1919 but you weren't quite sure so you put a question mark?

A. Well, it would fit either way."

The Government medical records of Eide (R. 62) also show that "he also had facial expression suggestive of encephalitis lethargica".

Regarding the beginning of Eide's total incompetency based upon a hypothetical question which was in turn based upon the evidence in the case, Dr. Conzelmann testified as follows (R. 65):

"Q. Do you believe sufficient facts have been testified to for you to trace back this condition as having existed in years past?

A. I believe that.

The Court: Do you believe you are justified in tracing back this condition of permanent and total disability due to the present condition of the plaintiff?

A. In my opinion the disease began after he had this influenza or what is called flu at the time in the Army.

The Court: Yes, but at what point do you believe it had attained such a magnitude as to constitute permanent and total disability, that is merely tracing back the origin?

A. Well, I believe that—As soon as the thing begins then they are totally disabled, but I believe this man as soon as he had recovered from his acute physical illness, his mental condition, however, he was totally incompetent.

The Court: Prior to his discharge?

A. Yes.

The Court: From the service.

A. Yes."

And again this witness testified (R. 66):

"The Court: It is your conclusion that as soon as the symptoms of what you consider dementia praecox appear that a person is totally and permanently disabled no matter if they actually are engaged in a vocation?

A. Yes."

And further concerning the diseases of encephalitis lethargica or sleeping sickness this medical expert again testified (R. 67):

"Mr. Gerlach: Will you tell us about the disease of encephalitis lethargica, what it is and how it acts?

A. Well, this encephalitis lethargica is, of course, a sleepy sickness where the individual becomes drowsy and sleeps. That was in the first cases to be observed they found the condition, but later they found some of them were merely excited or in delirious stage that would have to be confined in a hospital for mental sickness. Of course, when it passed off we sometimes have residual effects, paralysis of one arm or one side of the face or of one leg, or we have peculiar tremors

and the individual stands in one position and holds his arm very stiff and we call it Parkinson's disease or Parkinson's illness, paralysis, and it occurs after encephalitis. The whole brain is involved, the instrument of the mind, the member that controls our emotions and naturally when the nerves are inflamed why it would be responsible for the peculiar attitude."

And on cross-examination this doctor testified (R. 68):

"Q. Assuming it to be a fact that his discharge shows an entry that he had no disability, would that cause you to wish to reconsider the opinion that you gave?

A. No sir.

Q. You would still come to the same conclusion?

A. That is the way that he was discharged. I have discharged many hundreds of them in one day. We didn't make much of a mental examination at Camp Kearney. They went through in a hurry. We discharged them and put down 'They are physcially well.'

Q. Did you examine this man at Camp Kearney?

A. No.

Q. In other words, the examination you made there at the time they were discharged didn't amount to much?

A. Well, just in a general way. We didn't spend a half an hour examining a person for his mental condition or if they had delusions or hallucinations. If he appeared well and if he didn't complain, we thought he was all right.

Q. Well, Doctor, if he was at the time totally and permanently disabled from a disease known as dementia praecox, would not his facial expression, as you have related, have indicated a blank appearance at that time?

A. Well, it may have, yes, but it isn't necessary to have that because they look sometimes entirely normal in the dementia praecox."

Concerning the effect from a medical standpoint of the appellee's behavior immediately after his discharge, Dr. Conzelmann testified on cross-examination as follows (R. 71 and 72):

"Q. And you then as an expert, you considered that the testimony of the lady friend who told about how he appeared and acted to them, and what the mother testified as to how he acted, was sufficient to connect up the patient's condition with dementia praecox?

A. Yes.

Q. With that of 1919?

A. Yes.

Q. And to the extent that you believed he then was wholly disabled?

A. Yes.

Q. (By Mr. Hjelm). Well, I will put it—I didn't know that he would object and I thought would go as far as I could. Now, Doctor, you are not of the present opinion, are you, that the plaintiff here could not do any physical work in 1919, are you?

A. No, he can do physical work now.

Q. Did you know him, did you know that he was a railroad fireman in 1921 and '22.

A. That is what they testified to.

Q. Did you think he was wholly disabled then, at that time?

A. I think so, yes, according to——"

And again (R. 73 and 74) this witness testified as follows:

"My thought is that from the time he left the Army he should have been placed in some place where he wasn't employed. Making the effort and the stress and strain of life, of course, has caused him to break. In my opinion dementia praecox is not congenital, although there may be a predisposition to it that can be brought about by some event. Taking the definition of permanent and total disability as any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, I would say that he was totally disabled in 1919. I believe he was because he could not continuously continue. I feel that he should have been in a hospital at that time. I think this because from the evidence that one of the witnesses said, he was odd and queer and wouldn't talk. I wouldn't hospitalize every man who was odd and queer. Probably every one of us has some odd idea but it depends on the setting and what occurs. The fact that a person works, or does something doesn't mean he is not sick. *It is a fact that the degree with which dementia praecox accelerates or grows is different in various subjects and is also different under various circumstances.* In this case the evidence was in 1919 soon after he came out of service, he acted queer and odd.

Q. Haven't you, Doctor, in your experience as a doctor had many, numerous occasions, experiences where you have seen patients acting just as that young lady said he acted and notwithstanding that your observation of that subject over the years would be that he didn't develop into an active dementia praecox?

A. Well, I wouldn't say it was active but it was so that it didn't interfere with his work. If he continued it was to the detriment of his own personality because he had——

Q. Interposing: You later observed he could work, that he could do some work?

A. Oh, yes, they all can." (Italics ours.)

And on redirect examination this witness testified (R. 74, 75 and 76) as follows:

"A change of personality is this, a person becomes, or he is considered odd or queer or a little different and they are indifferent, apathetic and even, of course, those ideas of constantly trying to make good and a mental disease definitely recognizes itself. Very often they over rate their ability.

Q. I will ask you this, Doctor, are you able to make a diagnosis of dementia praecox in this case from the symptoms that were manifested in 1919 with the masklike expression and the pain and headaches in back of the head, back of the brain, back of the head and drowsiness?

A. I consider that symptoms of dementia praecox. The disease of sleeping sickness or encephalitis lethargica may have such symptoms in support, and an infection like that could be the

exciting cause of dementia praecox. There are a great many people who have dementia praecox that we are coming in contact with every day of our lives, but it is not very often evident that it is discernible and they are being treated. *My point is that dementia praecox is a type of disease that if you work will quicken it and once having made its manifestation it should be treated, and even though they can do things, slightly different lines of work, they should not be allowed to do them. They should be segregated.* I have seen cases in the asylum where people have come in and undergone treatment and got back and gone out of the asylum and met the outside work and then they came in contact and got nervous and came back into the asylum. They get better in the asylum than they do in the outside world, rest and quiet and shelter from the storms of life and treatment is the only way of effecting a cure." (Italics ours.)

And on redirect examination this witness testified (R. 76 and 77):

"Q. Do you believe in this particular case his whole trouble was caused by the war, his war experiences?

A. Well, I wouldn't say war experiences. I think the illness that he had."

Dr. Edwin M. Wilder, a physician of Sacramento, California, who formerly served on the staff of the California State Hospital at Napa, and who since 1905 has been a member of the Lunacy Commission of Sacramento County, examining patients arrested on

insanity warrants prior to their commitment to State Hospitals, testified for plaintiff (R. 80) as follows:

> "* * * Mr. Romaine's testimony as to his character when he came back to the office immediately after his discharge is the point that I definitely recognize a change of personality.
>
> The Court: In other words, you recognize then what appeared to be manifestations of dementia praecox?
>
> A. In the light of the further developments, yes. I would say that at the time Mrs. Martin saw him in the office in February or March of 1919 he was suffering from some type of dementia. Whether it was a result of the early dementia praecox or the result of encephalitis at this date I am not prepared to say. He may have had them both. We have testimony all through of some symptoms of both."

And testifying further, this doctor (R. 82, 83 and 84) stated:

> "My view is not that he could not muscularly do certain things but that the disease was a continuing thing and that if the matter has not been gone into with known types of treament—very much like tuberculosis, a fellow with tuberculosis. He is totally disabled. If he goes out and chops wood, he could chop wood for a while but he is just as much totally disabled in view of the fact he could not do it—. I believe from the time that dementia praecox made its manifestations and no matter how far it has progressed, as soon as you can recognize it as dementia praecox, that a man is totally and permanently disabled from then on.

Dementia praecox isn't revealed by the nature of the disease even in the early stages. There is a certain point where he always breaks down. He always loses his job. He hasn't good reasoning capacity. He works only under directions. You can take a man not far gone in dementia praecox and if he is not violent with an attendant standing alongside, he will hoe weeds but he may hoe the tops off the flowers at the same time.

The Court: That is when it has reached a certain point. Of course, if you establish that he has reached that point where he will do that—but what I am speaking of is this: Isn't there an early stage from the time it makes its manifestations that the man is able to seek and hold employment and to make a livelihood out of it?

A. They don't make a livelihood, Judge.

The Court: You don't believe this man could make a livelihood?

A. No. As soon as it makes its manifestations he is totally disabled. He is just as much dementia praecox as he ever will be later. Just like a typhoid; the first week, he may walk around and do his work. Well, he is just killing himself and he is just as much disabled then as he will be at the time when he drops. I believe that Mr. Eide showed all the symptoms of dementia praecox prior to July 1st, 1919 and it was reasonably certain at that time that he would carry this disease throughout his lifetime. I don't think dementia praecoxes recover. In the earlier stages of dementia praecox there is no question but that, the first few manifestations of the praecox, the quiet, the rest, are the most essential things in bringing the case to a condition of suspension. If you catch

a case and rest it a great deal, you have a reasonable amount of expectancy of getting it to remit at a relative high grade but in these later cases where they are definitely a dementia praecox it is unfortunate that we have occasional periods of irritation or over wear and tear that result in——

The Court: Interposing: Do you mean the progress of the disease?

Witness: The same amount of disturbance earlier will result in nothing more than modifying the degree while if you give it the same amount later you may kick up a certain amount of violence that will require sequestration and all that but at the same time you don't have any effect upon the termination of it. *I think the only hope of treating the disease successfully is to keep him at rest, to keep him from being up against the stress and storms of life.*" (Italics ours.)

In this respect we desire to call the Court's attention to certain statements made in counsel's brief, which we feel are not entirely accurate. On page sixteen (16) of their brief, counsel for appellant, in quoting Dr. Wilder's testimony state:

> "He thought the disease had its inception in the fall of 1918 or the spring of 1919 and was then in its incipient stage."

and quoting R. 79. Reading the record itself I think Dr. Wilder meant to convey a somewhat different meaning. The Record, page 79, reads:

> "Q. If those facts that have been testified to are true, when, in your opinion, did dementia praecox in the case of Arthur J. Eide begin?
>
> A. In the late fall of 1918 or spring of 1919.

Q. When would you say from those facts was the incipient stage?

A. Probably from the time of the severe infection of whatever character it was, also probably in camp until the first testimony that we have as to change in personality."

Another glaring misrepresentation and misquotation of the evidence is further found in the brief of counsel for appellant at the bottom of page 20 under the title "Analysis of the Evidence" where counsel in referring to Dr. Wilder's testimony states:

"Dr. Wilder never examined him."

We are afraid the Record is inclined to disagree with counsel's statement, for the Record on page 86 states:

"I examined this man Thursday, the 22nd day of February, 1934. I know nothing of him prior to that time except the testimony which I have heard here."

Concerning the effect of Eide's working on the railroad, on cross examination Dr. Wilder testified (R. 88):

"Q. So physical exercise, as I understand, Doctor, physical exercise in and of itself is not bad for him; in fact that is something you give them to help them. In other words, being occupied with something that ought to be done on a car or a train, that amount of thinking that would be required to do that, you don't think that that would be a strain, would hurry on the dementia praecox?

A. I do. I think working on a train, a train man and all the incidentals of train work are not conducive to the type or kind of rest, or any of the things that would help his recovery. Then the contacts, the responsibility in determining just when to make a flying switch, let them out, throw over a lever when the thing is within twenty feet or twenty-five feet, that is quite a problem."

And on redirect examination Dr. Wilder testified (R. 88 and 89) as follows:

"Q. In this particular case Mr. Hjelm has picked out various detailed instances of conduct by Mr. Eide and asked you to venture an opinion. What we are interested in is the whole picture, taking the whole picture clear back to the beginning when he was affable, agreeable, sociable, dependable, neat in appearance, and an ambitious young man before the war, he suffered the infection in the fall of 1919, followed by a complete personality change whereas afterward he presented a picture of undependableness, unsociability, mask-like expression, unreliability, bearing in mind all those things in the man, have you any question in your mind at all that he had dementia praecox and was permanently and totally disabled in the spring of 1919, prior to July 1, 1919?

A. I have no doubt. I have said so."

WHY A CLAIM FOR INSURANCE WAS NOT FILED UNTIL 1929.

In explaining why Mrs. Eide waited until 1929 to put in a claim for this insurance she testified (R. 90):

"Q. Now, the other question I want to ask you is this: You put in a claim in this case in 1929. Why didn't you put in that claim before?

A. Well, I didn't know if we had any right to it but someone told me down in Palo Alto that I should put in a claim.

Q. Just as soon as you learned you had a right under the policy, you put in a claim?

A. Yes."

SUPPOSED CONFLICT IN THE EVIDENCE.

It is true that certain government doctors as well as other government witnesses testified somewhat contradictory to the plaintiff's witness, but that is purely a question for the jury, whose verdict, we understand, on conflicting evidence is conclusive here. We cannot fail to remark in passing in this respect that there is a glaring inconsistency of at least one government witness, Henry Bogel who testified for the government by deposition, who when asked to describe the appellee stated that (R. 92):

"* * * At that time he was heavy set, and had blonde hair."

whereas the Record, page 60, states that it was recorded that when Eide was examined at the Palo Alto Veterans Hospital by the Government that he had brown hair, brown eyes and weighed 135.

Also, the Record, page 113, states that when Dr. Elmer L. Crouch, a government doctor at the Veterans Hospital at Palo Alto examined Eide he made the notation:

"Height: sixty-seven and three-quarter inches. Weight, 147 pounds dressed. Skin is rather oily, brunette. No eruptions or cicatrices. Hair: Dark brown, moderately thick, oily."

The Jury may well have concluded that not only the witness Bogel but many of the other Government witnesses were as badly mistaken in their testimony in other respects as they were in regard to Eide's appearance. However as we understand it, it was incumbent upon the appellee Eide to prove his case by a preponderance of the evidence and by the same token it was incumbent upon the appellant to prove its assertions by its witnesses and where there was a conflict in the testimony it was the sole and exclusive province of the jury to weigh the evidence and to determine in their own minds whom they were to believe and whom they were to disbelieve. At any rate such a conflict as we understand it presents no question for the appellate court.

Concerning the effect on mental patients of playing baseball Dr. Edwin J. Cornish, a witness for the government, testified on cross examination (R. 101 and 102) as follows:

> "Q. Mental patients can play baseball, can they not?
>
> A. Yes, if they can.
>
> Q. Yes. Mental patients are capable of playing baseball, are they not, although they are badly affected mentally?
>
> A. I think it would be possible for them, yes.
>
> Q. As a matter of fact at the State hospitals, Napa and also Stockton, you go up there on Sunday afternoon and you will see baseball games in operation where they have mixed teams of patients and attendants and sometimes doctors, isn't that true?

A. It might be, yes, part of the treatment for them."

Concerning the proper treatment for patients suffering with dementia praecox Dr. Elmer L. Crouch, a government doctor, testified (R. 128):

> "I think shutting a patient up in the early stages of dementia praecox is not only good practice—I think what causes the praecox to react is the difficulty of adjustment and the difficulty in finding themselves and something should be done to waken them with a certain thing, a line that they are interested in. That is part of the treatment of praecox. They make adjustment under supervision."

We submit that from the foregoing testimony it is clear that the facts in this case distinguish this case from the cases cited by counsel for appellant in their brief, particularly *United States v. Spaulding,* 293 U. S. 498. At the top of page 20 of their brief counsel for the appellant recognizes the rule that work performed at the risk to the insured's health or life will not bar recovery.

SINCE WHAT WORK THE RESPONDENT DID WAS AT THE RISK OF HIS HEALTH AND LIFE, HIS WORK RECORD DOES NOT BAR HIM FROM RECOVERY UNDER HIS INSURANCE CONTRACT.

In the leading case on what constitutes permanent total disability and the interpretation of the definition (Treasurer's Decision 20 W. R. dated March 9, 1918) the Supreme Court in *Lumbra v. United States,* 290

U. S. 551, 561; 54 S. Ct. 272, 78 L. Ed. 492 (at page 275, 54 S. Ct.) said:

> "The war risk contract unqualifiedly insures against 'total permanent disability.' The occasion, source, or cause of petitioner's illness is therefore immaterial. His injuries, exposure, and illness before the lapse of the policy and his condition in subsequent years have significance, if any, only to the extent that they tend to show whether he was in fact totally and permanently disabled during the life of the policy. March 9, 1918, in pursuance of the authorization contained in the War Risk Insurance Act, the director of the Bureau ruled (T. D. 20 W. R.): 'Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability. Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.'
>
> "The phrase 'total permanent disability' is to be construed reasonably and having regard to the circumstances of each case. As the insurance authorized does not extend to total temporary or partial permanent disability, the tests appropriate for the determination of either need not be ascertained. The various meanings inhering in the phrase make impossible the ascertainment of any fixed rules of formulae uniformly to govern its construction. That which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain

themselves, without serious loss of productive power, against injury or disease sufficient totally to disable others."

And again, on page 276, the Supreme Court said:

"Total disability does not mean helplessness or complete disability, but it includes more than that which is partial. 'Permanent disability' means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. He may have worked when really unable and at the risk of endangering his health or life."

And further, on page 276, the Supreme Court said:

"It may be assumed that occasional work for short periods by one generally disabled by impairment of mind or body does not as a matter of law negative total permanent disability."

In *United States v. Flippence,* 72 Fed.(2d) 611 (C. C. A. 10) at page 613, the Court said:

"On the other hand, it is settled by high authority, that if one, unable to work in the sense that he is afflicted with a disease where rest is indicated nevertheless works 'when really unable and at the risk of endangering his health or life' such work does not bar recovery if the proof shows the insured to be otherwise entitled to recover. Lumbra v. United States, 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 492. See also, Storey v.

United States (C. C. A. 10), 60 Fed. (2d) 484; United States v. Fitzpatrick (C. C. A. 10), 62 Fed. (2d) 562; United States v. Thomas (C. C. A. 10), 64 Fed. (2d) 245; United States v. Pearson (C. C. A. 10), 65 Fed. (2d) 996; United States v. Brown (C. C. A. 10), 72 Fed. (2d) 608. If, during the life of his policy, an insured is afflicted with a disease which may be cured by a period of rest, but if, instead of following that course, he works until the disease reaches the incurable stage after his policy lapses, he cannot recover; not, however, because barred by his work record, but because at the time his policy lapsed his disease was curable and his disability temporary. *On the other hand, if, as here, the malady is incurable before lapse, and if it is of a nature where complete rest is necessary to prolong life, then work done thereafter endangers his life and does not necessarily bar recovery.*" (Italics ours.)

In *United States v. Brown,* 72 Fed.(2d) 608 (C. C. A. 10), at page 610, the Court said:

"Employment may be of such a nature and duration that it conclusively refutes any idea of total and permanent disability. On the other hand, a person who is incapacitated to work, impelled by necessity and aided by a strong will, may engage in work that aggravates his condition and hastens his death. See Nicolay v. United States (C. C. A. 10), 51 Fed. (2d) 170, 172, 173; United States v. Phillips (C. C. A. 8), 44 Fed. (2d) 689, 691; Lumbra v. United States, 290 U. S. 551, 560; 54 S. Ct. 272, 78 L. Ed. 492.

"One who has a serious and incurable ailment for which rest is the recognized treatment and

which will be aggravated by work of any kind, is nevertheless totally and permanently disabled, although he may for a time engage in gainful employment. One so incapacitated may only work at the risk of injury to his health and danger to his life." (Italics ours.) See Lumbra v. United States, 290 U. S. 551, 560, 54 S. Ct. 272, 78 L. Ed. 492; Nicolay v. United States (C. C. A. 10), 51 Fed. (2d) 170, 173; United States v. Phillips (C. C. A. 8) 44 Fed. (2d) 689, 691; Carter v. United States (C. C. A. 4), 49 Fed. (2d) 221, 223; United States v. Lawson (C. C. A. 9), 50 Fed. (2d) 646, 651; United States v. Burleyson (C. C. A. 9), 64 Fed. (2d) 868, 872; United States v. Sorrow (C. C. A. 5), 67 Fed. (2d) 372; United States v. Spaulding C. C. A. 5), 68 Fed. (2d) 656.

In *United States v. Sorrow,* supra, the Court said:

> "One is totally disabled when he is not, without injury to his health, able to make his living by work."

In the case of *United States v. William J. Higbee,* 72 Fed.(2d) 773 (C. C. A. 10), the Court laid down the well recognized rule, which we submit is applicable to this case, as follows:

> "He has worked since then but it apparently was done in a commendable effort to earn a living. Total and permanent disability does not require that one be an invalid or confined to his bed. He may work spasmodically with frequent interruptions, caused by his physical condition, and still be totally and permanently disabled. (Nicolay v. United States, 51 Fed. (2d) 170; United States v.

> Rye, 70 Fed. (2d) 150.) And work done under pressure of necessity, when health requires rest, does not necessarily disprove disability. The jury may well have found that insured was totally and permanently disabled; that his condition required rest and inactivity, but that the inescapable necessity to earn a livelihood for himself and his family spurred him to work with injury and aggravation of his physical condition. If so, he is not barred from recovering upon his contract. (Barksdale v. United States, 46 Fed. (2d) 762; United States v. Phillips, 44 Fed. (2d) 689; United States v. Spaulding, 58 Fed. (2d) 656.) Neither the fact that he received vocational training nor his long delay in instituting this action is conclusive against his right to recover. Both are circumstances for consideration of the jury under appropriate instructions of the court. (Lumbra v. United States, 290 U. S. 551; United States v. Nickle, 70 Fed. (2d) 872.)"

We believe that there can be no question in regard to this case but that there was substantial evidence that Eide worked when really unable and at the risk of endangering his health or life. See *Lumbra v. United States,* 290 U. S. 551, 54 S. Ct. 273, 78 L. Ed. 492.

The Supreme Court in deciding the *Lumbra* case, and in its opinion after making the statement quoted above cites several cases. The first case cited by the Supreme Court in the note is that of *United States v. Phillips,* in which the Court said:

> "Some persons, who are totally incapacitated for work, by virtue of strong will power may continue to work until they drop dead from exhaus-

tion, while others with lesser will power will sit still and do nothing. Some who have placed upon them the burdens of caring for aged parents or indigent relatives, feeling deeply their responsibility and actuated by affection for those whom they desire to assist, will keep on working when they are totally unfit to do so. The mere fact that insured did work for Smith-McCord-Townsend Dry Goods Company and also for Montgomery Ward & Company does not necessarily prove that he could follow continuously a gainful occupation. The evidence shows that this work was carried on under great difficulty and was a light class of work." See United States v. Phillips, 44 Fed. (2d) 689 (C. C. A. 8).

The Supreme Court likewise cites, on page 499 of the *Lumbra* case, the case of *United States v. Godfrey.* In the *Godfrey* case, it appeared that the veteran was constantly on a payroll from October 14, 1919, until February 3, 1927, earning thirty to thirty-five dollars a week, and yet the verdict of the jury was accepted and the judgment affirmed, the Circuit Court for the First Circuit, saying:

> "The evidence is persuasive that Godfrey was a war victim. He was entitled to the most favorable view of the evidence. * * * To hold him remediless because he tried, manfully, to earn a living for his family and himself, instead of yielding to justifiable invalidism, would not, in our view, accord with the treatment Congress intended to bestow on our war victims."
>
> *United States v. Godfrey,* 47 Fed.(2d) (C. C. A. 1).

The next case cited in the footnote on page 499 of the *Lumbra* case is that of *Carter v. United States,* wherein Judge Parker stated the principle of law that we believe to be applicable in this case, which is:

> "To say that the man who works, and dies, is as a matter of law precluded from recovery under the policy, but that one who following the advice of his physician refrains from such work, and lives, is entitled to recovery, presents an untenable theory of law and fact, and emphasizes the necessity for a determination upon the facts in each case whether the man * * * was able to continuously pursue a substantially gainful occupation."
>
> *Carter v. United States,* 49 Fed.(2d) 221 (C. C. A. 4).

The next case cited in the footnote to the *Lumbra* case, on page 499, is the case of *United States v. Lawson* decided by this Court (50 Fed.(2d) 646). In the *Lawson* case the veteran went to work on May 15, 1920, at a salary of $1100 per annum, plus a bonus of $240, and worked for this for one year, and then after doing some other work, on April 1, 1921, he was given a probatory appointment as forest ranger at a salary of $1220 per year, plus an annual bonus of $240, serving in this capacity until August 31, 1923. On September 1, 1923, he was appointed as a forest clerk at a basis salary of $1100 per year, in which capacity he served until April 15, 1924. The latter part of September, 1924, he became Postmaster at Spencer, Idaho, his annual pay being $1100, and he held that

job at that salary continuously until the time of the trial in 1930, and this Court per Mr. Circuit Judge Sawtelle, said:

> "It might be argued that the fact that plaintiff managed to hold several positions for the greater part of the time during the years in question, and actually engaged in work, proves that he was able to work and not totally and permanently disabled. But this does not necessarily follow. It is a matter of common knowledge that many men work in the stress of circumstances, when they should not work at all. When they do that they should not be penalized, rather should they be encouraged. A careful examination and consideration of the evidence herein convinces us that the plaintiff worked when he was physically unable to do so, and that, but for the gratuitous assistance of friends and relatives who did much of his heavy work and the assistance of those whom plaintiff employed at his own expense, he would have been unable to retain his several positions. Under such circumstances, he should not be made to suffer for carrying on when others less disabled than he would have surrendered."
>
> *United States v. Lawson,* 50 Fed.(2d) 646 (C. C. A. 9) at 651.

We believe that the case at bar is a much stronger case than the *Lawson* case in favor of the veteran, for the reason that Lawson was still holding his position as postmaster at the time of the trial and at the time the appeal was decided while in the case at bar, Eide has been unable to attempt to do any work at all since 1922 or 1923.

In a case decided by this Court, that of *United States v. Burleyson,* 64 Fed.(2d) 868, it appeared that the veteran had worked continuously since service and was alive at the time of the trial, and this Court sustained the verdict, saying:

> "On this diagnosis the experts disagree, nor is it entirely clear from their testimony that it was detrimental to the veteran's health to work as he did in the event that he was suffering from Buerger's disease. However, the weight of this evidence was for the jury. Their verdict is to the effect that for the veteran to work continuously would impair his health. In view of this situation, no matter how unsatisfactory the condition of the record, we must hold that there was substantial evidence to go to the jury upon the question of the total and permanent disability of the veteran before the lapse of his war risk insurance policy."
>
> *United States v. Burleyson,* 64 Fed.(2d) 868 at 872.

In a case which involved a heart disability it appeared that the veteran had earned $15,000. (*United States v. Francis,* 64 Fed.(2d) 865, 9th C. C. A.) The verdict of the jury in behalf of the veteran was sustained upon the theory that it was for the jury to determine whether the work that he had done had been injurious to his life or health.

In summarizing Francis' work record, this Court per Mr. Circuit Judge Wilbur, said:

> "It is claimed by the veteran that notwithstanding his long periods of work and substan-

tial remuneration therefor, aggregating in all about $15,000., he was 'totally and permanently disabled' during that whole period, within the meaning of that phrase as defined by the Treasury Department regulations and by the decisions of the courts. This view was sustained by the jury under proper instructions from the court and the question is whether or not the court erred in denying the motion of the Government for directed verdict.

The testimony in favor of the veteran on the trial was directed to the proposition that although he did in fact work, and although he did so continuously for long periods of time, he was unable to do so because he thereby imperiled his health and shortened his life by reason of the excessive load put upon his heart, whose functions had been seriously impaired by the wound and resulting pus infection."

United States v. Francis, 64 Fed.(2d) 865.

The evidence shows that Eide was continually in pain and working caused his headaches to become worse (R. 36, 37, 38 and 39). Concerning the effects of a man working in constant pain the Circuit Court of Appeals for the 4th Circuit per Mr. Circuit Judge Northcott in *United States v. Harless,* 76 Fed.(2d) 317 at page 319 said:

"A man should be held totally disabled if he cannot work at any substantially gainful occupation without continuous pain and suffering of such a character that it would not be reasonable to expect him to endure it."

And as was aptly stated by a federal district judge, in a war risk insurance case (*McGovern v. United States,* 294 Fed. 108):

> "As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence."

In the following war risk insurance cases the Courts held the evidence sufficient to sustain the verdict:

Hicks v. United States (C. C. A. 4), 65 Fed.(2d) 517;

United States v. Lesher (C. C. A. 9), 59 Fed.(2d) 53;

United States v. Meserve (C. C. A. 9), 44 Fed.(2d) 549;

La Marche v. United States (C. C. A. 9), 28 Fed.(3d) 828;

Mulivrana v. United States (C. C. A. 9), 41 Fed.(2d) 734;

United States v. Riley (C. C. A. 9), 48 Fed.(2d) 203;

Fladeland v. United States (C. C. A. 9), 53 Fed.(2d) 17;

Bartee v. United States (C. C. A. 6), 60 Fed.(2d) 247;

United States v. Harless, 76 Fed.(2d) 317;

Gray v. United States, 76 Fed.(2d) 233;

United States v. Adams, 70 Fed.(2d) 486;

United States v. Anderson, 70 Fed.(2d) 537 (C. C. A. 9);

United States v. Griswold, 61 Fed.(2d) 583;
United States v. Jensen, 66 Fed.(2d) 19 (C. C. A. 9);
United States v. Sessin, 84 Fed.(2d) 667 (C. C. A. 10);
United States v. Hossmann, 84 Fed.(2d) 808 C. C. A. 8).

In their brief counsel for the appellant refer to certain supposed inconsistencies in the testimony of certain of plaintiff's witnesses on direct examination and on cross examination.

Speaking of inconsistencies, between the examination in chief and the cross examination of a witness, the California District Court of Appeals in *Vietti v. Hines,* 48 Cal. App. 266, 192 Pac. 80, said:

> "'In passing on the legal effect of plaintiff's evidence, the examinations in chief are not to be detached from the cross-examinations.' (Masten v. Griffing, 33 Cal. 111), and it may be added that in passing upon the testimony of a witness elicited on cross-examination, such testimony is not to be detached from his examination in chief or considered without reference to the latter. In other words, the testimony of the witness must be considered in its entirety to determine the weight to which it is entitled."

And as was said by the late Judge Sawtelle in *Louie Poy Hok v. Nagle,* 48 Fed.(2d) 753 (C. C. A. 9):

> "'Mere discrepancies do not necessarily discredit testimony. * * * Testimony must be understood in the light of the reason upon which they

> rest, * * * otherwise all testimony would be self-impeaching.' Wong Tsick Wye v. Nagle, 33 Fed.(3d) 226, 227 (C. C. A. 9)."

Counsel for the appellant also in their brief refer to certain statements made by the insane appellee in his application to the Southern Pacific when he applied to them for work. Certainly these statements at most were for the consideration of the jury and are certainly not conclusive as to the facts in any respect, it being a jury question pure and simple.

See

La Marche v. United States, 28 Fed.(2d) 828, 830 (C. C. A. 9);
United States v. Albano, 63 Fed.(2nd) 677, 681.

ANSWER TO APPELLANT'S BRIEF IN RE INSUFFICIENCY OF THE EVIDENCE.

Counsel cites among others the *Lumbra* case as authority for their claim that the employment such as the insane appellee held was sufficient to refute his claim and to bar recovery on his war risk policy. Without burdening the Court with quotations from the other cases cited we merely cite that the Supreme Court in the *Lumbra* case after stating what we have heretofore quoted said:

> "But that is not this case. Petitioner, while claiming to be weak and ill and, contrary to the opinion and diagnoses of examining physicians, that he was really unable to work, did in fact do much work. For long periods amounting in the aggregate to more than five years out of the ten

following the lapse of the policy he worked for substantial pay. No witness, lay or expert, testified to matters of fact or expressed opinion tending to support petitioner's claim that he had suffered 'total permanent disability' before his policy lapsed."

We submit there is no similarity whatsoever between the facts in the *Eide* case and the facts in the *Lumbra* case. Counsel in their brief state that plaintiff's medical testimony goes no further than to state that plaintiff was permanently and totally disabled and that such opinion evidence invades the province of the jury and has no force whatsoever.

We shall of course answer this argument in another part of our brief. However, at this time we wish to point out to the Court that disregarding the evidence of the doctors in testifying that plaintiff was permanently and totally disabled, certainly without this part of their testimony there is still ample evidence to show that from a medical standpoint the appellee Eide was permanently and totally disabled. Even the government doctors and the government reports cast a serious question as to whether or not the plaintiff was incompetent from 1919 and before his policy lapsed (R. 56, 57, and 133). Appellee's medical experts testified that basing their opinion upon the physical facts proved in the case, Eide was incompetent and insane and suffering from dementia praecox and probably in addition encephalitis lethargica at the time he came home from the Army and several months before his insurance lapsed.

Certainly it needs no citation of authority to the effect that one who is incompetent and insane is permanently and totally disabled. Counsel, on page 22 of their brief, say that if they were to assume that Eide was suffering from incipient dementia praecox on January 29, 1919 it did not constitute permanent and total disability until later. It must be remembered in this respect that appellee's medical experts placed the incipient stage of his dementia praecox in the fall of 1918 when he had the acute infection which caused his insanity (R. 79) and at the time of his discharge on January 29, 1919 it was not only well advanced and had rendered him insane and incompetent but was then incurable and that the only chance of rendering it stationary or holding it in a period of suspense was to keep him quiet and away from all work. In other words to protect him from the stress and strains of life, and to keep him under strict supervision. Counsel cites the cases of *Grant v. United States,* 74 Fed.(2d) 302, and *United States v. Alvord,* 66 Fed.(2d) 455, and also *Poole v. United States,* 65 Fed.(2d) 795, as authority for the proposition that "ordinarily work is helpful rather than harmful to a person afflicted with incipient dementia praecox" and states that work is prescribed as one of the standard forms of treatment prescribed in mental cases.

We submit that a reading of the *Grant, Alvord* and *Poole* cases hardly goes that far because after all, all those cases purport to do was to review the record in each particular case and decide upon the law as applied to the evidence in that particular case. We con-

tend that whether or not dementia praecox is a curable or an incurable disease is a medical question and not a legal question. Likewise, that as to the prescribed treatment for dementia praecox the question presented is a medical question for medical experts rather than a legal question for lawyers.

In *Poole v. United States,* supra, it appeared that Poole, who claimed to be suffering from dementia praecox, worked four years steadily as a drill press operator for the Southern Railroad Company between October, 1924 through 1929 and during that period earned $5,885.63; that he got better instead of worse and his guardian was discharged in 1927. Certainly that is not this case. We submit that the facts in *Grant v. United States* and *Alvord v. United States* are also strikingly dissimilar.

II.

ALTHOUGH NOT OBJECTED TO IN THE TRIAL COURT NOR EVEN SPECIFIED IN ITS ASSIGNMENTS OF ERROR, AND NOW SET FORTH FOR THE FIRST TIME IN ITS BRIEF ON THIS APPEAL, THE APPELLANT NOW SEEKS TO RAISE THE QUESTION OF WHETHER REVERSIBLE ERROR WAS COMMITTED IN THE INTRODUCTION OF MEDICAL OPINION TESTIMONY ON THE QUESTION OF WHETHER THE APPELLEE WAS TOTALLY AND PERMANENTLY DISABLED. SHOULD THIS COURT DISTURB THE JURY'S VERDICT FOR THIS REASON?

We are not unmindful of this Court's decision in the case of *United States v. Stevens,* 73 Fed.(2d) 695, holding that it is error to permit a doctor to state his

opinion on the question of the permanent and total disability of the plaintiff as an invasion of the province of the jury.

We are also familiar with the case of *United States v. White,* 77 Fed.(2d) 757, decided by this Court. What we claim, however, is that the *White* case has been impliedly overruled by the United States Supreme Court in the Government Insurance case of *United States v. Atkinson,* 56 S. Ct. 391, 296 U. S. ....., 80 L. Ed. .....

In the *Atkinson* case it appears that under a policy of converted Government Insurance the government challenged the Court's holding and instruction to the jury that "The permanent loss of hearing of both ears * * * shall be deemed to be total disability", quoting from the policy itself. It was claimed in that case that such instruction of the Court was contrary to the Supreme Court's ruling in *Miller v. United States,* 294 U. S. 435, 55 S. Ct. 440, 79 L. Ed. 977.

In the *Atkinson* case the government based its right to have the point reviewed by the Circuit Court of Appeals for the Fifth Circuit, on its Rule XI which we understand is almost identical with Rule 11 of the Circuit Court of Appeals for the Ninth Circuit. In fact the part of the rule relied upon is exactly the same, the last part of the last sentence in each rule reading:

> "* * * but the court, at its option may notice a plain error not assigned."

It is our understanding that in the argument in the Supreme Court, counsel for the government relied heavily upon the decision of this Court in *United States v. White,* supra. In passing upon this contention the Supreme Court said (56 S. Ct. 391 at page 392):

> "The government, by its assignment of errors here, assails, as it did in the court below, the correctness of this ruling, but examination of the record discloses that no such objection was presented to the trial court. In consequence the government is precluded from raising the question on appeal.
>
> The trial judge instructed the jury that respondent might recover either on the theory that his loss of hearing constituted in fact a permanent disability preventing his pursuit of any substantially gainful occupation, or that his loss of hearing of both ears, if permanent, was a permanent disability as defined by the policy. The jury was thus left free to return a verdict for respondent if it found that he had suffered permanent loss of hearing of both ears, regardless of its effect upon his ability to earn his livelihood. The government failed to question the correctness of these instructions either by exception or request to charge, and its motion for a directed verdict was upon other grounds not now material."

In deciding that the verdict of the jury will not ordinarily be set aside for error not brought to the attention of the trial Court, the Supreme Court said:

> "The verdict of a jury will not ordinarily be set aside for error not brought to the attention of

> the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. (Citing cases) It is substantially that adopted by Rule 10, subdivision 1, of the rules of the Court of Appeals for the Fifth Circuit, which requires the party excepting to the charge 'to state distinctly the several matters of law' to which he excepts, and directs that 'those matters of law, and those only, shall be inserted in the bill of exceptions.' "

Further commenting on this point, at page 392 the Supreme Court said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings. See New York Central R. Co. v. Johnson, 279 U. S. 310, 318, 49 S. Ct. 300, 73 L. Ed. 706; Brasfield v. United States, 272 U. S. 449, 450, 47 S. Ct. 135, 71 L. Ed. 345. But no such case is presented here. The judgment must be affirmed for the reason that the error assigned was not made the subject of appropriate exception or request to charge upon the trial."

In connection with the heretofore approved practice in the trial courts in war risk insurance cases of asking a doctor whether in his opinion the plaintiff was or was not permanently and totally disabled, may we

point out that as a legal proposition it was considered proper and approved practice up to about 1932 or 1933 to permit the doctor to state his opinion concerning the total and permanent disability of the veteran, and in fact the error was not so plain as to even suggest itself to counsel for a period of over twelve years to object to the same and in addition was not such a plain error as even suggested itself to any trial judge or even an appellate court during this period although thousands of war risk insurance cases were tried during which the question was almost invariably asked. In view of this situation it is our contention that such a question is not such a plain error not assigned as meets the rigid requirements set forth by the Supreme Court in the *Atkinson* case.

In fact there are any number of decisions of this Court as well as of other circuit courts of appeal in which it was considered proper to ask this question of a doctor and in which this Court was so impressed (prior to the Supreme Court's decision in the *Spaulding* case) as to affirm judgments based largely upon the doctor's testimony that in his opinion the plaintiff was permanently and totally disabled. In this respect see the following cases: *United States v. Francis,* supra, *United States v. Meserve,* supra, *United States v. Albano,* supra, and others.

In view of the foregoing we respectfully submit that the language of the Supreme Court in the *Atkinson* case that

> "*But no such case is presented here.* The judgment must be affirmed for the reason that the

> error assigned was not made the subject of appropriate exception * * * upon the trial." (Italics ours.)

is entirely appropriate in the instant case and the error should therefore be disregarded.

It is respectfully submitted that counsel for the appellant not having seasonably objected in the trial court to the error now complained of, nor preserved the same by appropriate action, their objection now comes too late and that their second point on this appeal is therefore without merit.

CONCLUSION.

In view of the foregoing it is respectfully submitted:

(1) That the evidence when tested by the applicable rules and the decided cases of the Supreme Court, this Court and other Circuit Courts of Appeal is amply sufficient to sustain the jury's verdict finding the insane appellee was permanently and totally disabled as of the date of his discharge from the service on January 29, 1919, and

(2) That in view of the Supreme Court's holding in *United States v. Atkinson,* supra, no reversible error was committed under the circumstances and therefore the judgment of the lower court should be affirmed.

Respectfully submitted,

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